NO. 46025-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHALISA HAYES, as the personal representative of THE ESTATE OF BILLY RAY SHIRLEY III,

Respondents,

v.

BILL'S TOWING AND GARAGE, INC., a Washington corporation, and THOMAS A. LOMIS and JANE DOE LOMIS, and the marital community composed thereof,

Appellants,

and RICHARD E. WELCH and JANE DOE WELCH, and the marital community composed thereof; and KOLLECTED SOULS SECURITY, a Washington Sole Proprietorship owned by RICHARD WELCH,

Defendants.

RESPONSE BRIEF

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Table of Contents

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

III. ARGUMENT RE: NO POST-TRIAL MOTION TO PRESERVE THE ISSUES FOR APPEAL 5

IV. ARGUMENT RE: COMPARATIVE FAULT & TRESSPASSER STATUS 7

a. The trial court did not abuse its discretion in refusing to submit a comparative fault jury instruction. 8

b. As a matter of proximate causation, nothing that the Lomis group alleged the Bill Ray did wrong was the legal cause of his death 11

c. The trial court did not abuse its discretion in refusing to submit a trespasser jury instruction. 14

d. The Lomis Group would not prevail even under a CR 56 standard and was fully able to argue the defense's theory of the case. 15

V. ARGUMENT RE: CAUSATION 16

VI. ARGUMENT RE: JOINT AND SEVERAL LIABILITY 18

VII. ARGUMENT RE: SCOPE OF POTENTIAL RE-TRIAL 19

VIII. CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Barton v. Department of Transportation, 178 Wash. 2d 193, 308 P.3d 597 (2013) 22
Baughn v. Honda Motor Corp., 107 Wash.2d at 142, 727 P.2d 655 19
Chapman v. Crawford, 104 Wash.2d 241, 704 P.2d 1181 (1985) 24
Christensen v. Royal School Dist. No. 160, 156 Wash 2d 62, 124 P.3d 283 (2005) 14
Colbert v. Moomba Sports, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008) 12
DeBroven v. Stockton, 490 S.W.2d 301 (1973) 20
Fenimore v. Donald M. Drake Const. Co., 87 Wash. 2d 85, 549 P.2d 483 (1976) 18
Gammon v. Clark Equip. Co., 104 Wash.2d 613, 617, 707 P.2d 685 (1985) 8
Glass v. Stahl Specialty Co., 97 Wash. 2d 880, 652 P.2d 948 (1982) 21
Hartley v. State, 103 Wn.2d at 779 ..... 13, 19
Havens v. C & D Plastics, Inc., 124 Wash.2d 158, 165, 876 P.2d 435 (1994) 7
Herring v. Dep't of Soc. & Health Servs., 81 Wash. App. 1, 23, 914 P.2d 67 (1996) 8
Kappelman v. Lutz, 141 Wash.App 580 (2007) 11
Lian v. Stalick, 115 Wash.App. 590, 62 P.3d 590 (2003) 5
McCurdy v. Union Pac. R.R., 68 Wash.2d 457, 413 P.2d 617 (1966) 23
Mina v. Boise Cascade Corp., 104 Wash.2d 696, 710 P.2d 184 (1985) .. 23
Morgan v. Johnson, 137 Wash.2d 887, 896, 976 P.2d 619 (1999) 15
Myers v. Smith, 51 Wash.2d 700, 321 P.2d 551 (1958) 23
Pedroza v. Bryant, 101 Wash.2d 226, 228, 667 P.2d 166 (1984) 10
Salas v. Hi–Tech Erectors, 143 Wash. App. 373, 386, 177 P.3d 769 (2008) 8
Schooley v. Pinch's Deli Market, Inc., 134 Wash.2d 468, 475, 951 P.2d 749, 753 (1998) 10
Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749 (1998) 12
Seholm v. Hamilton, 69 Wash.2d 604, 609, 419 P.2d 328 (1966) 10
Singleton v. Jackson, 85 Wn.App. 835, 935 P.2d 644 (1997) 17
State v. Carneh, 153 Wn.2d 274, 282, 103 P.3d (2004) 9
Taggart v. State, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992) 13

Tyner v. State Dept. of Social and Health Services, Child Protective Services, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) 13
Washburn v. City of Federal Way, 169 Wash. App. 588, 283 P.3d 567 (2012) 6
Webley v. Adams Tractor Co., 1 Wash.App 948, 950, 465 P.2d 429 (1970) 9
Welch v. Southland Corp., 134 Wash.2d 629, 635, 952 P.2d 162 (1998) 15
Winter v. Mackner, 68 Wn.2d 943, 945, 416 P.2d 453 (1966) 16

Statutes

RCW 4.22.070 19

Other Authorities

WPI 10.02 8
WPI 10.05 8
WPI 12.02 9
WPI 120.01 ..... 14, 16
WPI 21.03 ..... 8, 11, 16

Rules

CR 365-65 12
CR 50 ..... 1, 5, 6
CR 56 ..... 15, 16
CR 59 ..... 1, 5

I. INTRODUCTION

Appellee, Shalisa Hayes, submits this memorandum in opposition to the Appellant's (hereinafter "the Lomis group") appellate briefing. The trial court decisions and jury verdict should be affirmed. The Lomis group takes issue with a number of discretionary decisions on the part of the trial court. From the outset, it must be noted that the Lomis group never moved for a new trial in accord with CR 50 or CR 59. There was no effort to preserve the issues for appeal and/or even a request of the trial court to grant a new trial. This failure alone by the Lomis group proves fatal as an appellate body is not permitted to evaluate the types of rulings that have been raised in this appeal in the absence of a proper post-trial motion – which the Lomis group never filed. Moreover, even looking to the substantive arguments that are being improperly raised on appeal, none of the issues justify reversing the verdict and properly entered judgment. The leading issue raised by the Lomis group is that the trial court purportedly erred by not instructing the jury on comparative fault. In this regard, at the pre-trial phase of the case and during trial, the Lomis group failed to submit any evidence that the deceased teenager, Billy Ray, did anything wrong that caused his own death. Billy Ray was caught in the middle of a fire fight and tried to escape harm's way. Under Washington law, running from assailants and/or bullets is not negligent. The Lomis group also

attempts to argue that the trial court improperly refused to submit a jury instruction characterizing Billy Ray as a trespasser on the day of the shooting. On this issue, the evidence is not disputed: Billy Ray was allowed to walk right pass security and into the ongoing after-hours party on the day of his death. Billy Ray was not trespassing. Billy Ray was an invited patron. The remaining issues that were raised by the Lomis group include a severely strained attempt to contend that joint and several liability does not apply in this context and/or that judgment was improperly entered against Richard Welch. As is explained in detail in this memorandum, none of the Lomis group's appellate points have merit or warrant a new trial. For these reasons, the decisions of the trial court should be affirmed and the jury verdict should stand.

II. STATEMENT OF THE CASE

The Lomis group is the owner of an old, dilapidated storage facility that is located at 1615 Center St., Tacoma WA.[1] The property itself has been in the Lomis group for roughly twenty (20) years.[2] The lower section of the building is utilized for towing operations.[3] The upper section of the building is leased out intermittently to assorted tenants of all

[1] RP 637
[2] *Id.*
[3] *Id.*

kinds.[4] As a matter of history, the upper section of the building has served multiple purposes prior to the timeframe giving rise to this lawsuit, including as a hair salon and a location whereabouts other tenants have been known to host illegal parties.[5] The Lomis group leases the facility for extra cash to tenants that they find off of Craigslist.[6] It should be specifically noted that the building in question was never permitted for commercial use, ever. It was permitted for "storage only" and the Lomis group illegally plumbed the building, built an exit ramp (which was destroyed immediately after the incident), and failed to install any safety features, then chose to lease it to a hair salon and then to the tenant/defendant Welch.

Sometime during the summer of 2011, Richard Welch responded to a Craigslist ad and inquired about leasing the storage facility.[7] Mr. Welch met with Bill Lomis and discussed a potential lease.[8] During the meeting, prior to signing the lease, Mr. Welch informed Mr. Lomis that the storage facility would be used to host congregations for the motorcycle-biker club, the Kollected Souls, over which Mr. Welch was

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[4] *Id.*
[5] RP 598-99
[6] RP 599-601
[7] RP 602
[8] *Id.*

the President.[9] According to Mr. Welch, Mr. Lomis was aware, as of that time, that the members of Kollected Souls would be consuming alcohol on the premises.[10] Mr. Welch also advised Mr. Lomis that the storage facility would be used for repairing both motorcycles and automobiles.[11] Mr. Lomis did not mind as long as children were not present at the same time as alcohol was being consumed.[12]

There are different versions of the facts and as to who was occupying the premises on the night of the shooting. According to Mr. Welch's testimony, as of July 1, 2011, a different motorcycle gang, the Global Grinders, took over the tenancy of the building.[13] Yet, Tom Lomis found him on the property two weeks prior to the shooting, hosting a party, as did the police. According to one of the only eyewitnesses from that day, Shonna Randle, Billy Ray and his other young friends, Ricky and Geno, were openly permitted access and enjoyment of the after hours party on that day.[14] After the melee ensued, Billy Ray was unable to escape the building due to a lack of property emergency exists.[15]

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[9] RP 471-72
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] RP 363
[15] RP 300-01, 305-12, and 320-22

The particular theory presented by Ms. Hayes, and ultimately accepted by the jury, was that Bill's Towing wed separate and distinct obligations to Billy Ray. Generally, as a tenant, Mr. Welch had a duty to maintain safe premises for his patrons [16]and the Lomis group owed duties as a landlord to cure even open and obvious dangerous conditions[17] and maintain the common areas, in particular the stairs that were boarded up and blocked that would have allowed for a safe egress for Billy Ray. Instead of inspecting or maintaining the common areas and adhering to his obligations, defendant Tom Lomis said that patrons could "*jump from the windows*" if there was an emergency.

III. ARGUMENT RE: NO POST-TRIAL MOTION TO PRESERVE THE ISSUES FOR APPEAL

From the outset, it must be noted that none of the issues raised by the Lomis group are properly before the Court because there was never any proper preservation of the issues in accord with CR 50, CR 59, and/or *Washburn v. City of Federal Way*, 169 Wash. App. 588, 283 P.3d 567 (2012). In order to ask for a new trial on appeal, the Lomis group was

[16] Instruction 11, see also, WPI 120.06

[17] Instruction 13, Instruction 15, see also, *Lian v. Stalick*, 115 Wash.App. 590, 62 P.3d 590 (2003) (Washington adopting RESTATMENT (SECOND) OF PROPERTY § 17.6. (A landlord is subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenant by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of a duty created by statute or administrative regulation.)

required to file a proper post-trial motion. *Id.* Quoting Tegland, the *Washburn* Court noted:

> **Foundation for appeal.** A party may not simply move for judgment as a matter of law before the case is submitted to the jury pursuant to CR 50(a), and then (if the motion is denied) appeal from the final judgment on the basis of insufficient evidence. In order to lay a foundation for appeal, the party must first renew its motion for judgment as a matter of law pursuant to CR 50(b) or, in the alternative, move for a new trial based upon insufficient evidence. This requirement is based upon the belief that in the post-verdict context (CR 50(b)), the trial court should make the initial determination of whether the evidence was sufficient to support the verdict. The determination should not be made in the first instance by an appellate court.

Id. at 614. In relation to the underlying rational, the *Washburn* Court cited approvingly to the following principles:

> ...[d]etermination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Moreover, the requirement of a timely application for judgment after verdict is not an idle motion because it is ... an essential part of the rule, firmly grounded in principles of fairness.

Id. at 612. There can be no dispute: the Lomis group never filed a post-trial motion pursuant to CR 50, or any rule that provides for a preservation of the issues on appeal. In *Washburn*, this Court refused to entertain a request for a new trial on the same basis: "The failure to do so is fatal to its request that we review the trial court's denial of the City's CR 50(1) motion at the close of Washburn's case in chief." *Id.* at 614. Given the

undisputed failure to move for a new trial and give the trial court a chance to evaluate the evidence and make a decision, which would be the basis for this appeal, the Lomis group's request for a new trial must be denied. It would be procedurally improper for this Court to entertain any of the associated arguments given the Lomis group's neglect of the rules in this regard. *Id.*

IV. ARGUMENT RE: COMPARATIVE FAULT & TRESSPASSER STATUS

The trial court did not err by refusing to instruct the jury on comparative fault and/or the trespasser allegations. In this regard, a trial court has considerable discretion in deciding what specific instructions to give. *Havens v. C & D Plastics, Inc.,* 124 Wash.2d 158, 165, 876 P.2d 435 (1994); *Gammon v. Clark Equip. Co.,* 104 Wash.2d 613, 617, 707 P.2d 685 (1985). A trial court does not abuse its discretion if the instructions given allow each party to argue his or her theory of the case; it is under no obligation to give misleading instructions, or instructions that are not supported by authority. *Salas v. Hi–Tech Erectors,* 143 Wash. App. 373, 386, 177 P.3d 769 (2008); *see Gammon,* 104 Wash.2d at 617, 707 P.2d 685. Reversal is warranted only where the trial court abuses its discretion in a way that prejudices the complaining party. *See Herring v. Dep't of Soc. & Health Servs.,* 81 Wash. App. 1, 23, 914 P.2d 67 (1996).

a. The trial court did not abuse its discretion in refusing to submit a comparative fault jury instruction.

In order to prove "comparative fault" the defendant must show, "that [Billy Ray] acted, or failed to act, in one of the ways claimed by the defendant, and in so acting or failing to act, [he] was negligent; second, that the negligence of the plaintiff was a proximate cause of [his] own injuries and was therefore contributory negligent. *See* WPI 21.03. The burden of proving contributory negligence is on the Lomis group. *Id.* The Lomis group had the burden of establishing an affirmative defense by a preponderance of the evidence. *State v. Carneh*, 153 Wn.2d 274, 282, 103 P.3d (2004). Of important note, the Lomis Group never offered to the trial court, WPI 10.05 which is the negligent standard for minors, which Billy Ray was at the time of his death. Instead, the Lomis Group offered WPI 10.02 which was only applicable to adults. The Lomis Group now on appeal is arguing that the Court erred on not giving an instruction which was never offered.

Contributory negligence requires elements of negligence and proximate cause. *Webley v. Adams Tractor Co.*, 1 Wash.App 948, 950, 465 P.2d 429 (1970). In order to prove actionable negligence, a party must establish the existence of a duty, breach thereof, resulting injury and proximate cause between breach and the resulting injury. *See Schooley v. Pinch's Deli Market, Inc.*, 134 Wash.2d 468, 475, 951 P.2d 749, 753

(1998), *citing Pedroza v. Bryant*, 101 Wash.2d 226, 228, 667 P.2d 166 (1984). Questions regarding by whom a duty is owed, to whom it is owed, and duty's nature are questions of law, to be answered generally, without reference to facts or parties in a particular case. *Id.* at 867.

A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes a choice as a reasonably careful person placed in such a position might make, is ***not negligent*** even though is not the wisest choice. WPI 12.02 (emphasis added). The essential element to invoke the emergency doctrine is confrontation by a sudden peril requiring instinctive reaction. *Seholm v. Hamilton*, 69 Wash.2d 604, 609, 419 P.2d 328 (1966).

For example, in *Kappelman v. Lutz*, the trial court was found to have properly invoked the emergency doctrine. *Kappelman v. Lutz*, 141 Wash.App 580 (2007). The defendant in *Kappelman* was operating a motorcycle without a proper license, while speeding at night and struck a deer, injuring the plaintiff. *Id.* at 586. The experts testified that had the defendant been going the speed limit he would have been able to avoid the deer. *Id.* at 586-87. Further, the plaintiff established that the defendant was inexperienced in the operation of motorcycles, he showed poor judgment in carrying a passenger at night and reacted poorly to the hazard

posed by the deer. *Id.* at 587. The plaintiff argued that since the defendant's actions placed them in peril, he was not entitled to a sudden emergency instruction. *Id.* at 588-89. The court found the crucial element to be analyzed was whether there was "confrontation by a sudden peril requiring an instinctive reaction." *Id.* at 589, citing *Seholm*, 69 Wash.2d at 609. The Court agreed that although the defendant's actions may have caused the injury, there was sufficient evidence to suggest the ***situation itself*** would qualify as a sudden emergency. *Id.* at 590 (emphasis added).

This is a sudden emergency case. The entirety of this situation was caused by the Lomis group's utter lack of proper exits and by allowing admission to the public, there are to be proper means of egress and ingress. Billy Ray was assaulted inside the premises and was not able to safely flee the building. The emergency started then. The emergency continued until his death. His instinctive reaction to find safe harbor (which lead to a boarded up dilapidated stairway) was made instinctively and as a matter of law cannot be found negligent and therefore cannot be found comparatively at fault. This is a fact pattern upon which the emergency doctrine most appropriately applies. With or without the reliance upon the emergency doctrine, there was insufficient evidence presented to submit the issue of comparative fault to the jury. The trial court did not abuse its discretion.

b. As a matter of proximate causation, nothing that the Lomis group alleged the Bill Ray did wrong was the legal cause of his death.

According to *See* WPI 21.03, the Lomis group had the burden of proving not just a breach of reasonable care on the part of Billy Ray, but also legal causation. Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Colbert v. Moomba Sports*, Inc., 163 Wn.2d 43, 176 P.3d 497 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Id.* at 79. This inquiry depends on "mixed considerations of logic, common sense, justice, policy, and precedent." *See Hartley v. State*, 103 Wn.2d at 779; *Tyner v. State Dept. of Social and Health Services, Child Protective Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000). The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues (*see Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992)), "[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and

foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established." *Schooley*, 134 Wn.2d at 479–80.

The Lomis group failed to prove causation in connection with any purportedly comparative fault. Specifically, the Lomis group alleged Bill Ray was at fault because "*Bill Ray had tried to enter the premises at least three times before the day he was killed and was turned away by Welch, CR 365-65, (2) Bill Ray got into a fight at the property the morning he died, CP 621; (3) when the fight subsided, Bill Ray went outside the building, but despite the firing of gunshots, voluntarily went back into the building because his friend Ricky went back inside, CP 622, 628.*"[18] The Lomis group's allegations of comparative fault all failed as a matter of legal and/or proximate causation.

As to the Lomis group's first contention, Bill Ray allegedly being turned away from the building when Welch was in charge, on the day of the shooting Bill Ray was an invited patron of the current resident. Moreover, it is hardly an act of contributory negligence to one's own death to just show up to a facility that was open to the public. In other context, Washington courts have held that comparative fault is inapplicable in situations wherein a duty of protection is owed. *See e.g.*

[18] Lomis group Opening Brief, Page 12

Christensen v. Royal School Dist. No. 160, 156 Wash 2d 62, 124 P.3d 283 (2005) (students not comparatively at fault wherein a duty of care is owed). The act of simply patronizing a facility that the occupants are required to make safe is not comparative fault and certainly does not pass the proximate cause test in connection with Billy Ray having been shot and killed later that day. If that assertion were true, anyone who patronizes a nightclub would be comparatively at fault as a matter of law, which is not consistent with the applicable legal principles.

As to the second contention, Billy Ray purportedly getting into a fight, the truth is that Billy Ray and his friends were assaulted by a squad of bikers and attempting to defend themselves. Moreover, Washington law holds that "comparative fault is inapplicable in the context of an intentional tort." *Morgan v. Johnson*, 137 Wash.2d 887, 896, 976 P.2d 619 (1999); s*ee also Welch v. Southland Corp.*, 134 Wash.2d 629, 635, 952 P.2d 162 (1998). Billy Ray cannot, as a matter of law, be comparatively at fault for defending himself from being assaulted. As a matter of law, comparative fault does not apply to intentional tort fact patterns. Just an importantly, on these facts, Billy Ray having been placed into a position of having to defend himself from assaultive bikers does not pass the proximate cause test in connection with the lethal shooting.

As to the third contention, Billy Ray's purported attempt to reenter the building, it is hardly negligent to be placed in a position of deciding to run from stray bullets and electing to run one way over another. In accord with the emergency doctrine, Billy Ray's choices when attempting to flee the situation, and/or to seek safety for himself or his friends, it not an act of comparative fault than links up, as a matter of proximate causation, with the shooting. A person is not negligent for not knowing which way to run from an armed and combative group of bikers.

c. The trial court did not abuse its discretion in refusing to submit a trespasser jury instruction.

The trial court did not err by refusing to instruct the jury on the definition of a trespasser. According to WPI 120.01, "A trespasser is a person who enters upon the premises of another without permission or invitation, express or implied." The definition set forth in WPI 120.01 is derived from *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453 (1966); and the cases cited therein. *Id.* Permission may be express or implied. *Id.* An owner or occupier is deemed to have consented to a stranger's approach to the front entry of the facility absent an express communication otherwise. *Singleton v. Jackson*, 85 Wn.App. 835, 935 P.2d 644 (1997). Thus, generally, a party approaching a facility via a front entry will be considered a licensee, not a trespasser. On the day of the shooting, a security guard provided the boys with both express and

implied permission to access the storage facility within which the after-hours club was being operated.[19] Ms. Randle testified that Billy Ray, Ricky, and Geno were permitted to openly mingle throughout the building.[20] Richard Welch had vacated the property and a new subtenant and different motorcycle gang, the Global Grinders, permitted Billy Ray to walk right in the front door.[21] For that reason, on the day of the shooting, Billy Ray was not a trespasser. Billy Ray was an invited patron of the Global Grinders.

d. The Lomis Group would not prevail even under a CR 56 standard and was fully able to argue the defense's theory of the case.

The Lomis group argues that the comparative fault and trespasser issues should be analyzed under a CR 56 standard. That is not correct. The associated legal issues were debated in the context of motions during trial in order to determine which jury instructions were to be submitted and the format of the verdict form. *See e.g. Fenimore v. Donald M. Drake Const. Co.*, 87 Wash. 2d 85, 549 P.2d 483 (1976). The defense submitted both the issues of comparative fault and the trespasser issue as proposed jury instructions under Clerk's Papers 398-424. Even if a CR 56 standard were applicable during trial, which it is not, the Lomis group did not

[19] RP 363
[20] *Id.*
[21] *Id.*

conjure up enough evidence to support either issue. The trial court closely scrutinized the issues and the evidence and determined that the comparative fault (WPI 21.03) and trespasser (WPI 120.01) instructions were not warranted by the evidence. These were correct discretionary rulings by the trial court.

A trial court does not abuse its discretion if the instructions given allow each party to argue his or her theory of the case; it is under no obligation to give misleading instructions, or instructions that are not supported by authority. *Salas,* 143 Wash.App. at 386. Here, even in the absence of instructions on comparative fault under the trespasser issues, the Lomis group was afforded a fair trial and complete defense. In closing arguments, the defense was still permitted to argue the Billy Ray should have been more cautious, and that he never even should have patronized the after-hours club. The essence of the defense's theories of the case were preserved and ultimately argued. None of these issues are properly before the Court because the Lomis group failed to file a proper post-trial motion.

V. ARGUMENT RE: CAUSATION

Proximate cause is an element of any negligence theory; it consists of two elements: (1) factual or "but for" causation and (2) legal causation. *Baughn v. Honda Motor Corp.,* 107 Wash.2d at 142, 727 P.2d 655;

Hartley v. State, 103 Wash.2d 768, 777, 698 P.2d 77 (1985). Factual causation is established between a defendant's act and a subsequent injury only where it can be said the injury would not have occurred "but for" the defendant's act. W. Keeton, D. Dobbs, R. Keeton, and D. Owen, *Torts* § 42, at 273 **1184 (5th ed. 1984). As noted in *Baughn,* 107 Wash.2d at 142, 727 P.2d 655: "Cause in fact refers to the ... physical connection between an act and an injury." The existence of factual causation is generally a question of fact for the jury. *Baughn,* at 142, 727 P.2d 655.

In this case, the question of causation was properly submitted to the jury. As a primary theory of causation, according to the witnesses at the scene, if the sealed stairway had been properly maintained, an expeditious exit would have prevented Billy Ray's death as the boys could have exited *before* the shooting ever started. This circumstance is supported by the expert testimony of Mark Lawless.[22] As a second theory of causation, if the Lomis group had not leased a building that was unfit for human habitation, Billy Ray would not have been shot and killed on the premises.[23] If the building had been configured with proper exits, even after the shooting started, Billy Ray would have made it out the door during the shooting rather than ending up dead in the doorway.[24]

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[22] RP 300-01, 305-12, and 320-22
[23] *Id.*
[24] *Id.*

In an analogous case involving a landlord's failure to install proper emergency exits, the court observed that "the evidence indicates that the plaintiffs' decedent and others had gone to the door and were piled against the door. It is a reasonable inference that the failure of the door to open outward prevented escape. Such a reasonable inference will support submission of the issue of causation to the jury." *DeBroven v. Stockton*, 490 S.W.2d 301 (1973). Here, as to this theory of causation as to Billy's inability to escape the bullets after the shooting started, on this evidence, the conclusion should be no different. Billy Ray was found dead in the doorway trying to escape the building. The defense has repeatedly been unable to demonstrate that this case can be decided as a matter of law – because it should not be. Moreover, the Lomis group failed to preserve appellate review of this issue by filing a proper post-trial motion.

VI. ARGUMENT RE: JOINT AND SEVERAL LIABILITY

Given the absence of comparative fault on the part of Billy Ray, the Lomis group and Richard Welch are jointly and severally liable. RCW 4.22.070. There is nothing novel about this legal principle in application to the facts of this case. *Id.* Mr. Welch was indisputably bankrupt prior to the start of the trial. Prior to the entry of judgment, Ms. Shirley obtained an Order from the bankruptcy court allowing for the entry of judgment.[25]

[25] CP 598-99

The Lomis group offers no comprehensible legal argument, or citation, supporting an argument as to how and/or why the entry of judgment was in error. The Lomis group's attempted reliance upon *Glass v. Stahl Specialty Co.*, 97 Wash. 2d 880, 652 P.2d 948 (1982) is misplaced. In no way, shape or form does *Glass* stand for the proposition that the entry of judgment in this case was in error simply because Mr. Welch is insolvent. In essence, without any legal authority, the Lomis group is asking this Court to overturn Washington State's entire joint and several liability statutory scheme set forth under RCW Chapter 4.22. *et seq.* The fundamental purpose of joint liability is to shift the burden of paying the judgment to the at fault defending parties. *See e.g. Barton v. Department of Transportation*, 178 Wash. 2d 193, 308 P.3d 597 (2013). The trial court's entry of judgment against Billy Ray and the Lomis group should be affirmed. And this issue is not properly before this Court on appeal because the Lomis group failed to file a proper post-trial motion for the trial court to consider.

VII. ARGUMENT RE: SCOPE OF POTENTIAL RE-TRIAL

The judgment should be affirmed in favor of the Estate; however, if there is a reversal, the entire matter should be re-tried. The Lomis group stretches the holding in two cases that discussed a remand regarding "liability" only, to also include "allocation of fault" where no such holding

exists.[26] Here, the Lomis group is not only looking for a new instruction on comparative negligence but is also attempting to eliminate or exclude an entire party from the proceedings, that being Welch, on top of attempting to garner a comparative negligence instruction where a minor was fault-free. As stated in by the Supreme Court in *Mina*:

> A new trial may be limited to certain issues where it clearly appears that the original issues were distinct and justice does not require resubmission of the entire case to the jury. McCurdy v. Union Pac. R.R., 68 Wash.2d 457, 413 P.2d 617 (1966). If there is a possibility that the verdict was the result of a compromise, limiting retrial to certain issues improper. *Myers v. Smith*, 51 Wash.2d 700, 321 P.2d 551 (1958).

Mina v. Boise Cascade Corp., 104 Wash.2d 696, 710 P.2d 184 (1985).

In *Mina*, there was a single errant jury instruction on liability and a new trial was only needed to determine the liability of the parties in a motor vehicle collision case. *Id.* at 703-08. The defendant also relies on *Bauman* where the Supreme Court exempted minors from the negligence per se doctrine. *Bauman by Chapman v. Crawford*, 104 Wash.2d 241, 704 P.2d 1181 (1985). Neither of the cases address allocation of fault or a situation analogous to the present.

The Lomis group would like a trial where a jury would not be able to award damages as it is very well aware that the damages could be far in

[26] Appellant's Brief at 40 "If the case is remanded for a second trial, it should be limited to liability issues and ***allocation of fault among all the at-fault entities***".

excess of the verdict. The loss of future income alone presented by expert testimony at trial exceeded the jury's verdict. If this Court was persuaded by the arguments of the Lomis group, there is potentially a completely new set of facts to be presented at trial. For example, if this Court were to disagree with the Federal Bankruptcy Court on allocation of fault, there potentially would be completely new parties at a new trial. *Bauman* and *Mina* discuss an errant jury instruction on negligence and do not contemplate a new trial with new parties and the case being tried in a completely different fashion.

This issue, again, is not even properly before this Court. The trial court was never provided with an opportunity to hear and rule upon this novel bifurcation argument. The Lomis group improperly offers this argument for the first time on appeal. The manner in which this case is presented, in the event of a re-trial, should first be decided by the trial court. Instead of following proper procedure, the Lomis group skips the key step of getting a ruling from the trial court first. The fact of the matter is that the Lomis group lost this case fair and square. And now, without following the rules, the Lomis group is attempting to revise a new line of defense on appeal. As a matter of procedure and substance, the Lomis group's attempts to raise new issues on appeal should be denied.

VIII. CONCLUSION

None of these issues were properly preserved by a requisite motion for a new trial because the Lomis group never filed such a motion. The trial court did not err in relation to any of the issues raised by the Lomis group. The defense received a fair trial. In truth, the Lomis group rented an unsafe building to a bunch of bikers. The bikers began using the buildings for raging parties. Predictably, the parties raged out of control. On the day of Billy Ray's tragic death, the party turned lethal. Billy Ray died because Mr. Welch and the Lomis group failed to use reasonable care in such as a way as is required under the law. Judgment against the Lomis group in conjunction with Mr. Welch is proper. The joint and several statutory schemes were designed for the exact purpose of requiring one liable defendant to take the financial responsibility along with another liable defendant when they cause a harm or, in this case, a death. Justice was served in this case. If there was any injustice, it was that the jury award against the losing parties was not large enough and that the insurer for the Lomis group is stringing these issues out through the appellate process in lieu of actually paying the verdict. The trial court's decisions were not in error. The defense received a very fair trial. The jury verdict must stand.

DATED this 12th day of May, 2015.

Respectfully submitted

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHALISA HAYES, as the personal representative of THE ESTATE OF BILLY RAY SHIRLEY III,

Respondents,

v.

BILL'S TOWING AND GARAGE, INC., a Washington corporation, and THOMAS A. LOMIS and JANE DOE LOMIS, and the marital community composed thereof,

Appellants,

and RICHARD E. WELCH and JANE DOE WELCH, and the marital community composed thereof; and KOLLECTED SOULS SECURITY, a Washington Sole Proprietorship owned by RICHARD WELCH,

Defendants.

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

ORIGINAL

I caused to be served this date the following:

- Response Brief

in the manner indicated to the parties listed below:

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DATED this 12th day of May, 2015.

Vickie Shirer

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